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## Book Review - Copyright, Contracts, Creators: New Media, New Rules

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## BOOK REVIEW

### **Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Cheltenham, U.K.: Edward Elgar Publishing Ltd., 2010)**

*Teresa Scassa\**

In *Copyright, Contracts, Creators: New Media, New Rules*,<sup>1</sup> Giuseppina D'Agostino makes an important contribution to the scholarly literature on copyright law. In an age where so many works about copyright focus on the relationship between creators and users of protected works,<sup>2</sup> D'Agostino's book offers a refreshing change of perspective. She chooses to explore the no less important and often fraught relationship between publishers and authors, and she does so in the context of freelance authors who contribute to print publications. While the primary focus of the book is on U.K. law, it is a comparative work, and offers an analysis of developments in Canada, the U.S. and continental Europe as well. This accessible and engaging book is likely to be of interest to authors and publishers, to practising lawyers, and to academics and students of law.

The plight of the freelance author has been brought to the forefront of copyright consciousness by high profile decisions in both the U.S. and Canada that considered the scope of freelance authors' licences with major newspapers to publish the works in which the authors had retained copyright. Both *New York Times Co. v. Tasini*<sup>3</sup> in the U.S. and *Robertson v. Thomson Corp.*<sup>4</sup> in Canada involved disputes over whether the publishers, having obtained licences to publish the works in their print publications, were merely exercising their rights in their collective works when they reproduced the articles in electronic databases. D'Agostino critically

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<sup>1</sup> Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules*, (Cheltenham, UK: Edward Elgar Publishing Ltd., 2010).

<sup>2</sup> The Supreme Court of Canada characterizes the balance sought to be achieved in copyright law as that between creators and society (*Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, [2002] 2 SCR 336 at para. 30) This is recast in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 at para. 48 as a balance between creators and users. This is not by any means the only relationship of importance in copyright law, but it is the one which has been the focus of a great deal of contemporary scholarly writing.

<sup>3</sup> 533 US 483, 121 S Ct 2381 (2001).

<sup>4</sup> 2006 SCC 43, [2006] 2 SCR 363.

considers both of these cases, and situates these decisions within a careful and thoughtful exploration of the relationship between authors and publishers under copyright law. She considers the history of this relationship, and the evolution of contemporary copyright legislation in the U.K., Canada and continental Europe. D'Agostino describes her book as one which "evaluates the adequacy of copyright law to address the exploitation of freelance authors' works in the digital era."<sup>5</sup> She offers a detailed and thoughtful analysis of the lacunae in the legislation and, the power dynamics at play both in the drafting and reform of laws and in the negotiating of contracts. She ultimately proposes a range of solutions aimed to repair what she considers to be a fundamental lack of equilibrium in this area of law. Her approach is comparative, and takes into account law and litigation in the U.K., U.S., Canada and continental Europe.

D'Agostino is a professor at the Osgoode Hall Law School, where she is also the Founding Director of IP Osgoode, a centre for IP research and teaching. In her focus on author's rights, she has carved out for herself a distinct intellectual space in the Canadian IP academy which has tended towards an exploration of users' rights in copyright law. D'Agostino expressly situates herself outside of other conventional debates as well. She describes two scholarly camps: one which maintains that copyright can no longer serve the needs of contemporary society, and one which argues that existing laws can be adapted to meet those same needs. In not aligning herself with either camp, D'Agostino explains that: "Copyright law can and should cope, but it should by no means do so alone: government, industry players, authors and publishers' groups, and collecting societies must cooperate in reconfiguring the copyright system."<sup>6</sup> Indeed this pluralistic vision of copyright reform is reflected in her exposition of how to resolve the failings of copyright in the relationship between authors and publishers.

D'Agostino begins with an exploration of the copyright issues facing freelancers in an era of digital publication. The discussion takes into account the growing globalization of the publishing industry, as well as the increasing concentration of ownership in the hands of a few major publishing companies. She notes that "[t]he convergence in the structure of publishing from the small to large media conglomerates has affected the type of contractual arrangements between publisher and author and, in turn, the quality and diversity of publishing."<sup>7</sup> Analogizing freelance authors to sweatshop workers, D'Agostino explores the economics of freelance authorship as well as the revenue generation practices of newspapers and magazines. The discussion highlights the growing imbalance in bargaining power between individuals; contractual terms are increasingly dictated by publishers who seek to obtain rights for future and unspecified formats and markets. D'Agostino also recounts instances of retaliation against freelance authors who have attempted to assert their rights or to dispute contractual terms.

D'Agostino provides an engaging account of the history of copyright law from the perspective of the freelance author, as well as an account of the history of the copyright contract in relation to the freelancer. In this respect her work is again

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<sup>5</sup> D'Agostino, *supra* note 1 at 5.

<sup>6</sup> *Ibid* at 11.

<sup>7</sup> *Ibid* at 21.

notable. Unlike many other works that focus largely on the terms of copyright legislation in exploring copyright issues, D'Agostino includes a study of the history, practices, and jurisprudence relating to copyright contracts. She considers judicial approaches to the contractual relationship between author and publisher at common law, in equity, and even in the context of the bankruptcy of a publisher. Her perspective is clear: the lacunae in the law can best be understood by considering how contracts between parties of unequal bargaining power consistently exploit the law to favour the stronger party. Indeed, her account reveals that courts have often been sensitive to this imbalance of power, and she documents a solid history of case law that interprets ambiguities in contractual terms in favour of the author. Her broader argument, supported by this case law, is that any reforms must be understood in light of what is needed to protect vulnerable authors from undue exploitation.

D'Agostino's critique of copyright law — both domestic legislation and international conventions — is that it is ultimately pro-publisher rather than pro-author because of the extensive space it creates for private bargains. Of the *Berne Convention*,<sup>8</sup> she writes that its “long-drawn out history shows a persistent preoccupation in ensuring authors’ freedom to contract.”<sup>9</sup> She is equally critical of the lack of genuine consideration for authors in other international conventions, though she notes that TRIPS,<sup>10</sup> at least, is quite explicit in its trade-oriented aspirations. Of the WCT<sup>11</sup> she laments that “[m]eant to usher copyright into the digital era, it does so primarily for industry by providing a framework for states to enact digital and technical protection measures.”<sup>12</sup>

Indeed, this analysis of copyright laws and international treaties supports D'Agostino's historical analysis which shows the emergence and development of copyright law as a vehicle to protect industry interests. The author, placed notionally at the centre of emerging copyright legislation, is merely a convenient stepping stone to the concentration of rights acquired by contract by industry players. In this reality, D'Agostino's arguments to strengthen the hand of authors seeks to restore at least some of the stated ambitions of copyright law as legislation about the rights of authors.

Perhaps not surprisingly, D'Agostino finds that civil law jurisdictions have tended to be more favourable towards the protection of authors. Indeed, it is part of copyright dogma that civil law jurisdictions embrace a natural rights view of copyright as inhering to the author,<sup>13</sup> and combine strong moral rights protection in tandem with economic rights. In the case of freelance authors, she notes that many

<sup>8</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 UNTS 221.

<sup>9</sup> D'Agostino, *supra* note 1 at 98.

<sup>10</sup> *Agreement Establishing the World Trade Organization, Annex 1 C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, online: WTO <[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)>.

<sup>11</sup> *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 at Art 5 (entered into force 6 March 2002), online: <[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html)>.

<sup>12</sup> D'Agostino, *supra* note 1 at 111.

<sup>13</sup> See, for example, the exposition of this view by Justice Binnie of the Supreme Court of Canada in *Théberge*, *supra* note 2 at 367.

civil law countries include legislative provisions regarding “transfers of economic and moral rights, transfers of future rights, reversion, contract formation and interpretation rules, special provisions and collective licencing.”<sup>14</sup> She notes in particular provisions that require, in the case of ambiguity in licences and assignments, that these contracts should be interpreted in the author’s favour.<sup>15</sup> By contrast, common law jurisdictions are silent as to the dynamics of contracting. In this regard, globalization has another impact. The digital era in publishing gives rise to an increasing number of private international law issues. D’Agostino notes that differences across national copyright laws can mean that the rights of an author may vary from jurisdiction to jurisdiction. In this context, contracts dictated by publishers will contain choice of law clauses that favour publishers’ interests.

The cases of *Tasini* and *Robertson* offer clear illustrations of the conflicts between authors and publishers in the digital age. D’Agostino offers a discussion and critique of these decisions, as well as an analysis of their aftermath and the ongoing disputes spawned by both cases. In both cases, publishers argued that although their contracts with freelancers were silent as to the publication of works in the new media, the electronic publication of the contents of their newspapers was an exercise of their rights in copyright law to publish these collective works. D’Agostino is critical of both the U.S. and Canadian Supreme Courts for avoiding key contracting issues between the parties, and instead focussing their analysis on the interpretation of the copyright legislation in each jurisdiction. Although the freelancers won notional victories in each case, without some means of addressing their inequality of bargaining power, the victories are largely pyrrhic. Indeed, D’Agostino notes that in *Robertson*, the majority of the Court confirmed that “[p]arties are, have been, and will continue to be free, to alter by contract the rights established by the *Copyright Act*.”<sup>16</sup> D’Agostino describes this as “a strong pronouncement on the persisting power of freedom of contract to trump any statutory-based right.”<sup>17</sup> She notes that the post-*Tasini* use of standardized contracts in the industry to arrogate to publishers all digital rights cannot be seen simply as an exercise in freedom of contract. From a policy perspective, however, it represents a fundamental shift in balance that she argues should be countered in the legislation.

Similar litigation in continental Europe offers what D’Agostino considers to be useful precedents in considering an alternate approach to such issues. She notes that legislation in many continental European countries is less vague on key issues around the interpretation of contracts, and as a result, the court rulings are “more attuned to freelancers’ disadvantages.”<sup>18</sup> She remains critical, however, of the foreseeability principle applied by these courts. Courts applying this principle consider the extent to which a new medium for the exploitation of works that is not explic-

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<sup>14</sup> D’Agostino, *supra* note 1 at 122.

<sup>15</sup> *Ibid* at 125-126. D’Agostino references the work by L. Guibault and B. Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union — Final Report* (Amsterdam: Institute for Information Law, May 2002).

<sup>16</sup> D’Agostino, *supra* note 1 at 158, citing *Robertson*, *supra* note 4 at para. 58.

<sup>17</sup> D’Agostino, *supra* note 1 at 158.

<sup>18</sup> *Ibid* at 164.

itly addressed in the contract was foreseeable at the time of contracting. D'Agostino argues that the principle introduces unpredictability and uncertainty into the equation, particularly as there is bound to be debate over the extent to which a particular technology or medium was "foreseeable" at any point in time, and there may be distinctions between a foreseeable technology and foreseeable commercial applications for that technology. She notes that something like a foreseeability principle may be creeping into North American jurisprudence, and she cautions that this principle relies too much on questionable assumptions about freelancers' bargaining position.

D'Agostino devotes a chapter to the state of law and practice in the U.K. At the time of writing, she notes, there was no litigation equivalent in scope to *Tasini* or *Robertson*, although some settlements of disputes had been reached with major newspapers, suggesting that the same issues are alive and well in the U.K. In this chapter she considers how a comparable case in the U.K. might be decided, with the U.K. presenting an interesting blend of continental and common law principles. She notes that this, combined with the contract law jurisprudence discussed earlier, and which tends to favour authors in cases of ambiguity, leaves her cautiously optimistic about the outcome of any such litigation. However, she notes here, as elsewhere, that the costs of litigation are too high to be borne by many authors, and these costs, combined with the risks and uncertainty make it an inferior option to addressing the issues in the context of law reform.

To this end, the final two chapters of the book attempt to arrive at a set of solutions to the difficulties expounded upon in the preceding chapters. Chapter 10 explores the role of theory in justifying or supporting particular positions. D'Agostino demonstrates that both natural law and economic theories can be used to support the arguments of either publishers or freelancers. She introduces into her analysis Marxist theory, arguing that the Marxist focus on imbalance in power relations is crucially important. She argues that "the Marxist lens not only exposes the copyright industry as one largely favouring capitalist publishers, but also exposes the difficulties in crafting solutions especially (and solely) via copyright."<sup>19</sup>

Indeed, in crafting her solutions to the problem d'Agostino takes a holistic approach that considers the many different ways that law and policy can play a role in reform. First, she would see changes to copyright legislation to resolve issues of ambiguity in interpreting contracts of assignment or licence in favour of authors. She also proposes *sui generis* legislation governing freelance authors, that would take into account the particular dynamics and realities of that industry. She argues for these changes to be reflected at the national, regional and international levels.

Beyond the reform of laws and treaties, D'Agostino would also argue for approaches to judicial interpretation of contracts that would take into account the unequal bargaining power of freelancers. In her view, this is consistent with a long history of British case law interpreting such contracts. She advocates as well for the use of other possible tools, including voluntary codes or best practices for the industry, and model agreements. She proposes a grievance board, which would offer a much lower cost and more efficacious means of settling disputes. She sees a potential role, as well, for collective societies, and for a restructuring of payments for

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<sup>19</sup> *Ibid* at 248.

freelance work from a simple lump sum to some combination of a lump sum and royalties. Finally, she advocates for educational initiatives as a means of better informing freelancers as to their rights and alternatives.

*Copyright, Contracts and Creators* is a well written book that offers some much needed insight into a relationship that is often ignored in copyright scholarship. By shifting the frame of analysis from owner-user to author-publisher, D'Agostino introduces fresh ideas and perspectives into the debate around copyright reform. Her work is also refreshing for its blending of doctrinal copyright analysis with contract law. D'Agostino negotiates the gap between what the law permits and what industry dictates. In doing so, she offers clear and important insights into how lawmakers — and the courts — should tackle the public policy issues inherent in the unequal relationships enabled by copyright law.